U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 19 2009

SRC 07 127 52142

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering services company. It seeks to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess five years of progressive work experience.

On appeal, counsel submits two additional letters of work experience and states that these two letters provide sufficient evidence of the beneficiary's progressive work experience.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The beneficiary possesses a foreign four-year bachelor's degree in civil engineering, obtained in 1983 from National University, The Philippines.[2] The documentation submitted to the record with

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] With the petition, the petitioner an academic evaluation report dated March 14, 2007 written by

regard to any further studies establishes that the beneficiary received a Master's degree in Business Administration from Central College of the Philippines in 1988. The beneficiary's master's degree is not in the field stipulated in the Form ETA 9089, namely, engineering.

Thus, the petitioner has established that the beneficiary possesses a bachelor's degree in the requisite field of study. The primary issue in this matter is whether the beneficiary possesses the requisite five years of progressive work experience stipulated on the Form ETA 9089.

As noted above, the Form ETA 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

[redacted], University of Maryland, Robert Smith School of Business. [redacted] stated that based on the beneficiary's coursework, the beneficiary's four-year degree in civil engineering from the National University in the Philippines was the equivalent to a U.S. baccalaureate degree in civil engineering.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, 4-B, and 5-B of the labor certification reflect that a master's degree in engineering with thirty-six months of work experience is the minimum level of education and work experience required. Part H, 7 and 7-A indicate that an alternate field of study is acceptable and identifies the alternate major field o study as "Master's Degree." Part H, lines 8-A, 8-C, and 9 indicate that a bachelor's degree with 60 months of work experience is an alternate level of education, and that a foreign educational equivalent is acceptable. Line 10 and 10-B indicate that experience of 60 months in an alternate occupation is acceptable and identifies the job title of the acceptable alternate occupation as "Engineering job." At line 14, Specific skills or other requirements, the petitioner states: "Employer will accept bachelor of science in engineering with

five years experience in engineering job in lieu of master of science in engineering with three years experience."

The AAO notes that the petitioner, at Part J, line 21, marked "no" for whether the alien gained any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested. With regard to the beneficiary's work experience, Part K. Alien Work Experience, states the following: "List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." With regard to the beneficiary's work experience, Part K indicates the following work experience:

Job One
Employer Name: [redacted]
Job Title: Project Engineer
Start and End Date: January 11, 2006 to December 25, 2008 [3]

Job Two
Employer Name: [redacted] Encino, California
Job Title: Project Engineer
Start and End Date: February 2, 2004 to October 15, 2005[4]

Job Three
Employer Name: [redacted], Quezon City, the Philippines
Job Title: Assistant Director
Start and End date: October 1, 2001 to August 31, 2003[5]

The record contains a letter of work experience dated September 1, 2003, written by [redacted], Human Resource Division, Digitel Telecommunications. [redacted] states the beneficiary worked for Digitel from October 1, 2001 to August 31, 2003. The writer states the beneficiary held the position of Assistant Director for Project Construction and Quality Assurance Section under the Network Infrastructure Department of the Network Planning and Development Division, Digitel Mobile Phils., Inc. This letter was submitted with the initial petition. The director's RFE dated March 27, 2007 requested evidence of the beneficiary's five years of progressive post baccalaureate experience, in particular, letters of experience with detailed description of the duties that the beneficiary performed.

[3] The Form ETA 9089 was filed on December 13, 2006. The beneficiary's ending date for work with the petitioner is a prospective date. The beneficiary's current work experience with the petitioner after the priority date cannot count toward fulfilling the required minimum work experience and work with the petitioner in the United States is not generally considered qualifying experience. Based on this job description, the beneficiary has work experience as a project engineer with the petitioner prior to the 2006 priority date of one year and eleven months.

[4] This earlier period of employment is one year and eight months.

[5] The beneficiary's employment with Digitel was for one year and ten months.

The petitioner in response submitted a letter dated January 10, 1991, written by [redacted] Regional Cities Development Project, Department of Public Works and Highways. [redacted] state that the beneficiary with a title of "Suv'g. Engr. III" was employed by the Department from February 2, 1984 to December 31, 1990. The petitioner also submitted a letter dated August 20, 1991 from [redacted] Civil Engineering Department, National University. [redacted] states that the beneficiary was a part-time instructor at the university from June 7, 1988 to August 15, 1991. A third letter dated January 15, 1995 written by [redacted]., location unidentified states that the beneficiary worked for the company from January 2, 1991 to December 31, 1994. A fourth letter dated February 8, 1997 was written by [redacted], WFB Builders, Inc. The letter writer states that the beneficiary was an employee from January 2, 1995 to January 31, 1997.

On appeal, the petitioner submits a letter dated April 16, 2007 written by [redacted] Department of Public Works and Highways, Manila, The Philippines. [redacted] states that the beneficiary was an Engineer III from February 2, 1984 to December 31, 1990 at the defunct Regional Cities Development Project, a foreign assisted project funded by the International Bank of Reconstruction and Development (IBRD). [redacted] provided an extensive list of specific duties performed by the beneficiary. The petitioner also submitted an additional letter of work verification dated April 17, 2007 from [redacted], SKS Construction, Encino, California. [redacted] verified the beneficiary's employment as project engineer form February 2, 3004 to October 15, 2005 and lists the beneficiary's specific duties and responsibilities in project construction scheduling, preparation of architectural and structural design, preparation of requests for information/clarification, among other duties.

The petitioner cannot establish that the beneficiary possesses the equivalent of an advanced U.S. degree based on the beneficiary's combined undergraduate degree in engineering and his professional work experience. As stated previously, based on [redacted] academic evaluation, the petitioner has established that the beneficiary has the equivalent of a four-year U.S. bachelor of science in engineering degree. Nevertheless, the beneficiary does not meet the work experience requirements stipulated on the labor certification. The AAO notes that the Form ETA 9089 only lists the beneficiary's employment with the petitioner, with SKS Construction, and with Digitel. As the beneficiary's employment with it prior to the priority date cannot be used as qualifying experience, the total period of work experience established by the Form ETA 9089 is three years and six months.

The letters verifying work experience that was not included on the Form ETA 9089 constitute material changes to the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The only work experience that the AAO may consider in these proceedings are the positions listed on the certified Form ETA 9089.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.